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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1.

HARRY BRIDGES,

Petitioner,

against

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S BRIEF ON REARGUMENT.

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PETITIONER'S BRIEF ON REARGUMENT.

We believe that a further statement of the facts and issues may be helpful to this Court upon the reargument of this case.

Petitioner has been convicted of contempt of Court because of the publication of a telegram which he sent to the Secretary of Labor of the United States. Petitioner was the President of the International Longshoremen's & Warehousemen's Union. The telegram in question was sent three days after a decision by Judge Schmidt of the Superior Court of the State of California in an action in which a local of that Union and its officers (but not petitioner) were defendants (R. 7, 8). The decision granted an in-

junction and appointed a receiver. It was the culmination of a controversy between an A. F. of L. union and a C. I. O. union for control of the hiring halls and other facilities of organized labor in the shipping industry on the West Coast.

The telegram is as follows:

> "This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board" (R. 2, 3).

Shortly thereafter a proceeding for punishment for contempt was instituted by the Executive Secretary of the Los Angeles Bar Association. Petitioner denied any intent to obstruct justice (R. 42) and, by demurrer, claimed the protection of the 14th Amendment (R. 40). The matter came on before a judge other than the one involved in the litigation which prompted the sending of the telegram. This judge, although stating:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt nor his decision" (R. 47),

punished petitioner for contempt on the ground that the statements contained in the telegram and the publication of the telegram were "calculated to and had an inherent tendency" to interfere with the administration of justice and to control the proceedings in the action already referred to (R. 52). This conclusion was predicated upon the contention that the case before Judge Schmidt was pending undetermined because the time to apply for a rehearing had not expired (R. 47). Petitioner was sentenced to pay a fine of $125 (R. 52).

The Supreme Court of California affirmed the conviction. Its opinion is reported in 14 Calif. 2nd 464. Judge Edmonds of that Court dissented. In upholding the conviction the California Supreme Court, in this and the similar *Los Angeles Times* case (now before this Court) disregarded the plain terms of a fifty-year old California statute, holding it to be unconstitutional. The statute provides:

> "But no speech or publication reflecting upon or concerning any court or officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings (sec. 1209, Code Civ. Proc.)."

On this state of facts petitioner believes that there are three questions for the consideration of this Court:

1. Is the power of State judges to punish for contempt subject to the restriction of the due process clause of the Fourteenth Amendment?

2. If such restriction exists what is its nature and extent?

3. Was the conviction in the case at bar proper?

Petitioner contends for the following answers to each of these questions.

1. The power of State judges to punish for contempt is restricted by the due process clause of the Fourteenth Amendment to the same extent as is the power of the executive and the legislature.

2. Where, as here, the act complained of is an expression of opinion concerning judicial action and the expression takes place outside of the courtroom, there can be no punishment except where the expression either actually obstructed judicial action, or was intended improperly to influence judicial action or, in the absence of such intent, there was a clear and present danger that judicial action would improperly be influenced.

3. There was no justification for the punishment in the case at bar.

POINT I.

The power of State judges to punish for contempt is restricted by the due process clause of the Fourteenth Amendment to the same extent as is the power of the executive and legislative branches.

The applicable provision of the Fourteenth Amendment to the United States Constitution reads:

> "nor shall any state deprive any person of life, liberty or property without due process of law."

That this provision is applicable to action by the judicial branch of the government, as well as to action by the legis-

lative and executive branches, is well established by decisions of this Court. As was said by Mr. Justice Brandeis in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, at 680:

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."

This rule has been applied both to procedural violations of the due process concept and to situations in which the state action was found to violate the basic constitutional guarantees of freedom of speech, of the press, of assembly and of religion, and in both civil and criminal cases.

Thus, on the procedural side, this Court has reversed convictions where the accused was denied an opportunity to obtain counsel (*Powell* v. *Alabama*, 287 U. S. 45); where the State courts permitted conviction although the only evidence was obtained by torture (*Brown* v. *Mississippi*, 297 U. S. 278); where the judge who imposed a fine was paid by being allowed to keep part of the fines he imposed (*Tumey* v. *Ohio*, 273 U. S. 510). And this Court has also held that judicial action is void when it permits a trial to become an instrument of the mob's desire to lynch (*Moore* v. *Dempsey*, 261 U. S. 86); or where a State judge permitted conviction by the deliberate use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103).

And in civil cases State judicial action has been similarly challenged. Thus, in *Hansberry* v. *Lee*, 311 U. S. 32, this Court held that there had been a failure of due process where a State Court allowed a party to plead as res adjudicata a judgment obtained in a suit in which the other party had not been represented.

So this Court has ruled also when it concluded that the basic constitutional guarantees of freedom of expression had been invaded. Convictions have been reversed because the State courts permitted the case to go to the jury in

the absence of evidence sufficient to justify conviction under the applicable statute (*Fiske* v. *Kansas*, 274 U. S. 380; *deJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242).* In *Cantwell* v. *Connecticut*, 310 U. S. 296 and *A. F. of L.* v. *Swing*, 312 U. S. 321, this Court set aside state judicial action on the ground that freedom of speech had been interfered with.

It is true that the application of this principle has not yet been extended by this Court to cases involving contempt of Court.** The only case arising from State action in which the problem was presented to this Court is *Patterson* v. *Colorado*, 205 U. S. 454. But that case can no longer be considered authoritative on the subject since it doubted whether the Federal Constitution protected against State interference with freedom of the press and supposed that freedom of expression was protected primarily against attempts at prior restraints and not against subsequent punishment, positions which have ceased to be accepted by this Court (compare cases from *Gitlow* v. *New York*, 268 U. S. 652, through *Cantwell* v. *Connecticut*, supra). It is the dissenting opinion of Mr. Justice Harlan in the *Patterson* case which foreshadows the present view of this Court.

In view of the wide protection given by this Court to freedom of expression and opinion in a long line of recent

*That a State statute was involved in these cases does not detract from the ultimate fact that this Court reversed because the State judges had permitted conviction on evidence which did not meet the constitutional requirements of a criminal act.

**There are, however, some state decisions which have held punishment of publications as contempts to be prohibited by the free speech provisions of their Constitutions:

Ex parte Hickey, 12 Miss. 750 at 782;
State ex rel. Metcalf v. *District Court*, 52 Mont. 46;
People ex rel. Supreme Court v. *Albertson*, 242 App. Div. (N. Y.) 450;
State ex rel. Attorney General v. *Circuit Court*, 97 Wisc. 1;
See also *State* v. *American News Co.*, 54 So. Dak. 385.

cases when this expression was interfered with by legislation, or by judicial misinterpretation of such legislation,* it cannot be supposed that this Court will hold that the power of State judges to punish for contempt is free from any constitutional restraint under the due process clause.

Indeed there are special reasons why judicial action in punishing for contempt should be subject to scrutiny on constitutional grounds. Where legislative action or executive action is in question, the power of review falls to a different branch of government. Not so in contempt cases. Here the judiciary sits in review upon the acts of its own members. Moreover, in many cases, although not here, the action under review was taken by the very judge criticized in the publication complained of. And in all cases the procedure is summary, without that safeguard of trial by jury which has been found in Anglo-Saxon countries so necessary to protect the common man against judicial tyranny. As we have shown, judges are not immune from constitutional restrictions when exercising their functions as interpreters of the law or when presiding over trials, both criminal and civil. To exempt them from such restrictions when they are exercising the very special power of punishing for contempt would be an anomaly indeed. And that this Court does not suppose that any such exemption exists may be inferred from the careful language of Mr. Justice Douglas in *Nye* v. *United States*, 313 U. S. 33, where he said:

> "We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power" (p. 50).

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*Near v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *deJonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *The Leaflet Cases*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S 106; *Cantwell* v. *Connecticut*, 310 U. S. 296.

We confidently assert, therefore, that the constitutionally permissible scope of the contempt powers is not unlimited. We shall now concern ourselves with various suggested limitations on that power.

POINT II.

Where, as here, the act complained of is an expression of opinion concerning judicial action and the expression takes place outside of the courtroom, there can be no punishment except where the expression either actually obstructed judicial action, or was intended improperly to influence judicial action or, in the absence of such intent there was a clear and present danger that judicial action would improperly be influenced.

The restrictions of the due process clause have, under modern interpretation, assumed a double aspect. With the strictly procedural phase we need not here concern ourselves. But it is now well settled that the due process clause has a substantive meaning as well. Because the contempt here charged consisted of a publication outside of the courtroom, we shall restrict ourselves to a discussion of the extent to which the modern conception of due process in its substantive sense imposes a limitation upon the power of the courts to punish such publications.

There are, we suggest, four possible varities in the nature of the publications which might be subject to punishment as interfering with the administration of justice:

1. Those which actually obstruct judicial proceedings;

2. Those which while failing to achieve their purpose were intended to obstruct;

3. Those which neither obstruct, nor were intended to do so, but which were put out under circumstances such

ta. there was a clear and present danger that obstruction would result.*

4. Those which merely had a "reasonable tendency" to cause obstruction.

There never has been dispute but that publications falling within the first category might be punished as contempt of court. But controversy has raged with regard to the other three categories; in large part whether punishment should take the form of the summary method of contempt or the more protective method of indictment. With that controversy, we shall not concern ourselves, believing that it raises no issue under the federal constitution. But we contend that to permit any punishment for expression of opinion merely because it has a "tendency" to interfere with the administration of justice does violate the constitutional guaranties of the 14th Amendment—that such punishment is as forbidden in this field as in the field of espionage, sedition or breach of the peace.

Before elaborating this subject, it will be helpful to review the recent cases in this Court which have dealt with restrictions on freedom of expression, however attempted. This Court has recognized that the right freely to express one's views is an essential attribute of democratic society. It has recognized also that this right is not absolute and that the state may restrict the right, as by punishment for criminal libel, by punishment for advocacy of violent overthrow of government—and also by punishment for contempt of Court. On the one hand, is the guaranty of free expression embodied directly in the Constitution with regard to the Federal Government, and indirectly, through the due process clause, with regard to the states. On the other hand, is the requirement that orderly government

*The applicability of the "clear and present danger" test to cases of contempt of court was suggested by Judge Learned Hand, dissenting, in *Ex parte Craig*, 282 F. 138, 160.

persist. Both of these are essential to the functioning of a democratic society. When, as here, it is claimed that one of these requirements conflicts with the other, it becomes the high duty of this Court to reconcile the conflicting claims.

When the conflict between State action, though declared by legislation, and free expression of opinion was clear, this Court has not hesitated to cast the balance in favor of freedom of expression (*Herndon* v. *Lowry*, supra; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496). And in *Schneider* v. *Irvington*, 308 U. S. 147, Mr. Justice Roberts said at page 161:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as adminishes the exercise of rights so vital to the maintenance of democratic institutions."

There the Court held that ordinances banning the distribution of leaflets upon the public streets were void despite the contention of municipalities that such ordinances were necessary to prevent littering of the streets. So, in *Thornhill* v. *Alabama*, 310 U. S. 88, this Court held void a State statute which banned peaceful picketing though enacted to protect employers in the conduct of their lawful businesses. There Mr. Justice Murphy said:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of

> public concern without previous restraint or fear of subsequent punishment."

And, as already noted, this view was extended in *A. F. of L.* v. *Swing*, supra, to judicial action without the support of State statutory law where an injunction had been issued against all picketing. Mr. Justice Frankfurter said there that the right to free discussion "is to be guarded with a jealous eye." Recognizing that the State had power to regulate problems created by industry and to preserve the peace, he said:

> "Not even these essential powers are unfettered by the requirements of the Bill of Rights."

This Court rejected the justification sought to be made by the State courts in that case, based on the circumstance that the dispute was one between the workers and an employer by whom they had never been employed.

Finally, in *Cantwell* v. *Connecticut*, supra, this Court, in addition to holding void a statute which vested in administrative authority the right to determine whether a cause for which money was being solicited was a religious or charitable one and which prohibited solicitation except under license by such authority, also reversed a conviction for disorderly conduct. In so doing Mr. Justice Roberts expressly stated that he was weighing "two conflicting interests": "the free exercise of religion protected by fundamental law and the interest of the State in the preservation of peace and good order."

For the purposes of our present discussion the *Cantwell* case is, therefore, of the closest interest. This Court pointed out that the conviction was not based on a statute evincing a legislative judgment that the particular kind of discussion there being carried on had a tendency to provoke disorder, although doubt was expressed as to the validity even of a statute so carefully drawn. It was noted that

the judgment there under review was "based on a common law concept of the most general and undefined nature." It was recognized that various forms of speech might be punished without constitutional restraint for causing a breach of the peace, as words which incite to riot or exhort to physical attack. In pointing to those things which the State could punish without constitutional restraint, the Court stressed the "*clear and present danger* of riot, disorder, interference with traffic upon the public streets, or other *immediate* threat to public safety, peace or order" (emphasis ours). The Court also pointed out that resort to epithets or personal abuse might be punished since these did not constitute communication of information or opinion. Finally, Mr. Justice Roberts said:

> "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."

The language of the *Cantwell* case can well be applied to the case at bar. Here, as there, the conviction was not based on a statute evincing a legislative judgment that the particular kind of discussion had a tendency to impair the administration of justice—on the contrary, as we have noted, there is a statute which declares the very opposite.* Here, as there, the judgment under review is based on a very general common law concept. And in neither case was there any clear and present danger or other immediate threat to an interest which the state might protect.

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*Quoted on page 3.

If one may venture to draw a generalization from the foregoing cases it might be formulated in the following terms: Any attempt on the part of State authorities to interfere with freedom of expression is void unless the expression is of a character which directly produces a substantial evil which the State has the right to correct or there is a clear danger that the expression, if unpunished, might presently produce such an evil.

In applying this attempted formulation to cases of contempt of Court two considerations must be kept in mind. In the first place, we are concerned only with publications outside the courtroom which are intended to convey information or express an opinion and which may not fairly be characterized as merely abusive of the Court. It is such publications alone for which we claim the constitutional protection. In the second place, we recognize that the State has an interest in the maintenance of its judiciary free from improper influence and that pursuant to such interest the State could, by legislative declaration, punish such interference either as a criminal act or as a contempt of Court and we suppose that judges (at least in the absence of legislation) might devise rules of their own for the protection of this interest of the state just as they have devised such rules in elaboration of the concept of breach of the peace (compare *Cantwell* case, supra).

However, as we have already pointed out, in California there is no statute giving to the courts the power to punish as a contempt expressions of opinion made outside the courtroom. On the contrary, California has a statute which expressly denies such power to the courts.* It is true that California courts have declared this statute to be unconstitutional as an invasion of the "inherent" power of the courts. See *In re Shortridge*, 99 Cal. 526; *Ex Parte Shuler*, 210 Cal. 377. And this view was reiterated by the majority of the Supreme Court of the State in the case

*Quoted on page 3.

at bar (R. 147-152). Similar statutes have been likewise disregarded in most of the other states.*

While we recognize that this Court can have no concern with state decisions interpreting state constitutions, we believe it nevertheless to be within the province of this Court to consider the fact that the Legislature of California has declared a policy contrary to that pursued by the State Court in the instant case and that the State Court in reaching this conclusion relied upon legal doctrine now generally discredited. Indeed, the State Court in reaching its conclusion drew heavily from the now overruled *Toledo Newspaper Company* case (247 U. S. 402). The majority opinion (R. 151) even suggests that that decision denied Congress the power to determine what acts might be punished by Federal courts as contempts.

The doctrine of the "inherent" power of courts to punish summarily publications made outside of court derives, of course, from Blackstone. We will not lengthen this brief with an elaborate discussion of the error of this doctrine. It has been fully treated in many places. See *Fox, The History of Contempt of Court* (1927), *Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts* (1924), 37 Harv. L. R. 1010; *Nelles and King, Contempt by Publication in the United States* (1928), 28 Col. L. R. 401, 525. While this Court did not take occasion to review the English authorities when overruling the *Toledo* decision in the *Nye* case, supra, it recognized that Congress in 1831 sought to restrict the judicial power over contempt of Court. By there giving effective meaning to that legislation this Court

*Such laws were enacted in Alabama, Arkansas, Colorado, Georgia, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, West Virginia and Wisconsin. They appear to have been disregarded in all the states except Iowa, Minnesota, New York, Oregon, Pennsylvania and Wisconsin. See Appendix to Nelles and King, 28 Col. L. Rev. 554-562; 48 Yale L. J. 54, 58.

has rejected the notion held by so many state courts that there was an inherent power to punish as contempts acts committed outside the presence of the court, a power not subject to legislative curtailment.

And in the recent case of *State ex rel. Pulitzer Publishing Company* v. *Coleman*, 152 S. W. 2nd 640 (Mo., 1941), the Missouri Supreme Court reviewed all of the authorities and reached the conclusion that its own earlier decisions upholding the "inherent" power to punish out of Court publications as a contempt was based on a misunderstanding of legal history and the English authorities. In that case the Court held no contempt had been committed because the case which was under discussion had been closed—the fact that there was another case pending which involved one of the same defendants was held to be immaterial. An attempt was made by relator to obtain a ruling that no publication outside of court could ever be punished as a contempt though the case involved was still pending. The Court rejected that argument stating:

> "Publication of personal and unreasoned criticism of a Court before which a case is pending often tends to substitute trial by newspaper for trial by the Court and jury and would tend to bring about a decision based upon the momentary whim of a publisher or the desire of the mob rather than one based upon the law and the evidence."

It should be noted that in that case the publications complained of were vituperative in the extreme. We do not here contend that no out of court publication may ever be punished as a contempt without violating constitutional guarantees, this not being the forum for discussing the propriety of judicial self-restraint in this field.

We do contend, however, that the mere fact that the case is still pending does not, by itself, solve the problem. If there can be no punishment for contempt at all with

regard to a closed case, the question still remains whether the circumstances of the particular case justify a punishment though the case be pending. And we also wish to make it clear that we do not rest our contention solely upon the summary character of the method adopted. We recognize, as was pointed out in the article by Nelles and King, supra, that the constitutional argument goes beyond the question of summary trial. As was there said at page 407:

> "For the free press question would arise if the sponsors of a publication were tried by indictment instead of by a court without jury."

So we come to the basic question, to what extent is it proper for a state to punish for contempt of Court expressions of opinion with regard to a pending case. As we have already said, we are not here concerned with vituperative or other unreasoned comments. These may well be punished as criminal libels. The fact, however, that the State has the right to punish for criminal libel or for contempt of court cannot justify the conclusion that any statement may be punished as a libel or a contempt. Surely this Court would rule that a true statement, however defamatory, made with good motives or justifiable cause, could not be punished as a criminal libel. So clearly, a true statement concerning even a pending case, however derogatory to the judge involved, could not be punished as contempt of court. Suppose that a judge in the conduct of a case had bullied a witness or in some other way exhibited an arbitrary manner or unjudicial temperament. Surely a reporter might recount such occurrence without fear of punishment for contempt—though the article might well bring the judge involved into high disrepute in the community. Nor should expression of opinion, even about the issues of a pending case, be punishable.*

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*See the excellent statement on this subject in Nelles and King, supra, at 548-552.

So the expression of an opinion concerning the past action of a judge must be free from threat of punishment where the expression does not itself obstruct justice or is not directed toward obtaining from the judge a decision based upon improper considerations. And it should make no difference that, in a technical sense, the case was not closed. The artificial lines sought to be drawn in the case at bar between cases pending and cases determined has no substantial meaning.

Whatever might be the rule with regard to publication before decision—the true application of the "pendency" criterion—to hold that publications may be punished merely because the time for rehearing has not expired exalts form above substance, establishes a criterion lacking in reason and sets up a trap for the unwary. For the layman seldom knows anything about when rehearings are available.* Experience has taught him, moreover, that judges change their minds in a negligible proportion of cases, so that he considers the right to ask for a rehearing illusory.** And there is authority for the proposition that a case is pending until final appeal, authority noted with apparent approval by the lower California court in the *Los Angeles Times* case (see record in this Court, No. 3 of this Term, at p. 109). If such a rule be adopted then no criticism of a lower court decision could ever be safely made. This Court should not permit punishment of publications upon a criterion so mechanical and so devoid of

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*Indeed, petitioner testified, without contradiction, that he knew nothing about any rehearing (R. 116, 122, 123). And it must be remembered, he was not a defendant in the equity action (R. 7, 8, 153).

**Besides, in some courts, there is no fixed period for making such an application. As in the New York Court of Appeals—See Cohen, The Powers of the New York Court of Appeals, p. 286. In *People ex rel. Pierson* v. *Lynch*, 266 N. Y. 431, a motion for reargument was entertained, though denied, one year after the original decision (see 263 N. Y. 533). Moreover, no time is fixed in New York in which an application must be made for reargument of a Special Term decision—which may finally adjudicate rights, as in a proceeding by way of mandamus (see N. Y. Civil Practice Act, Art. 78).

real meaning. Whatever formula may be adopted with regard to permissibly punishable publications, it should be confined to comments before decision.

For criticism of the courts has been one of the continuing privileges of the American way of life. As was said by Mr. Justice Frankfurter in *United States* v. *Morgan*, 313 U. S. :

> "In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press."

It has never been considered contempt of court because the critic may have hoped that his views might have weight with an appellate court or indeed with the same judge upon a subsequent occasion. For it is a commonplace that much criticism, often sharply phrased,* is voiced immediately after the publication of a decision without any thought of possible rehearing or further appeal. Such criticism has been published by officials, by trade union leaders and by interested organizations, such, for instance, as the American Civil Liberties Union. Have these all been subject to punishment? Whatever may be the view with regard to publications concerning cases before a jury verdict there can be no reasonable ground for belief that the freedom and integrity of the courts needs the support of the power to punish for expressions of opinion made out of court.

And that there is no real need for the existence of such power is made clear by the experience of states where, as in California, power has been denied to the courts by

*Sharp indeed were the objections voiced upon this Court's decision in *New York ex rel. Tipaldo* v. *Morehead*, 298 U. S. 587. See New York Times June 2, 1936, 1:6, 7; 19:1-7. Recent instances with regard to lower court decisions are reported in New York Times March 31, 1940, 1:1; 41:1, 2; February 20, 1941, 1:2; 14:2.

the legislature, but where, unlike California, the courts have observed the limitations imposed upon them. In New York, Pennsylvania,* South Carolina and Kentucky, this has been the rule for more than a century (see Nelles and King, supra, 543). Some state courts have, regardless of statute, rejected the "reasonable tendency" rule without any apparent loss in prestige. See *State* v. *American News Co.*, 64 So. Dak. 385; *Nixon* v. *State*, 207 Ind. 426.

Against this background we shall now refer to the opinions in the California courts and the authorities there relied upon. Judge Bishop, while recognizing that petitioner as a labor leader was bound to continue his efforts on behalf of the men whom he represented (R. 45), came to the conclusion that the telegram went beyond the requirements of such duty because it would "inevitably interfere with the orderly administration of justice" (R. 46), although he recognized that it would not cause the judge to change his mind. Judge Bishop did not consider any constitutional issues at all.

However, in the Supreme Court the free speech issue was considered after the Court had declared the publica-

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*The Pennsylvania statute punishes by way of indictment a publication which improperly tends to bias either the public or the Court:

> "If any such publication shall improperly tend to bias the minds of the public, or of the court, the officers, jurors, witness or any of them, on a question depending before the Court, it shall be lawful for any person who shall feel himself aggrieved thereby to proceed against the author, printer and publisher thereof, or either of them, by indictment * * *" (17 Pa. Stat. Ann., Purdon 1930, §2045, Act of 1836, P. L. 784, §27).

The only recorded case arising under this statute is *Comm.* v. *Conroy*, 69 Pittsb. Legal Journal 373 (indictment held sufficient; nature of publication not stated).

In New York the same act, namely, the publication of a "false or grossly inaccurate" account of proceedings may be punished as a contempt (Judiciary Law, §750 [b]) or as a misdemeanor (Penal Law, §600 [7]). Publication of defamatory matter concerning a judge has been held not within these provisions (*People ex rel. Barnes* v. *Court of Sessions*, 147 N. Y. 290; *People ex rel. Supreme Court* v. *Albertson*, 242 App. Div. 450).

tion to be a contempt because it had "a reasonable tendency" to interfere with the orderly administration of justice in pending actions (R. 156). In support of that conclusion it cited three cases from this Court, the *Toledo Newspaper Company* case, which has already been referred to and recently overruled by this Court; *Patterson* v. *Colorado*, 205 U. S. 454, and *Sinclair* v. *United States*, 279 U. S. 749. These cases were also relied upon (R. 158) in rejection of petitioner's contention that the reasonable tendency test was an infringement of his constitutional rights and that there should be applied either the "clear and present danger" test or the principle that there could be no punishment for contempt in the absence of actual obstruction.

Of course, the *Sinclair* case has no application whatever to the situation involved in the case at bar since the contempt there charged was not a publication but an attempt to tamper with a jury. The California Supreme Court (R. 157) erroneously attributes to the opinion of Mr. Justice McReynolds in that case a long quotation which is actually a quotation from the now overruled *Toledo* case, though later incorporated in the *Sinclair* opinion.

Patterson v. *Colorado*, supra, requires more detailed consideration. The charge of contempt in that case arose from the publication of certain articles and a cartoon which reflected upon the motives and the conduct of the Colorado Supreme Court in cases there pending which had to do with the tenure of office of the Governor and other officials of the state. In effect, the articles charged that the Court was involved in a scheme to unseat Democrats and replace them with Republicans. The publisher of the articles claimed that the charges were true and that he had a constitutional right to make them.

As already noted, Mr. Justice Holmes, speaking for the majority of the Court, doubted whether the Fourteenth Amendment protected the right of freedom of speech against State action. He reached the conclusion, moreover, that

even if it did it went no further than to protect against previous restraints. Beyond indicating that truth would not be a defense in contempt any more than it might be in criminal libel, the opinion of Mr. Justice Holmes contains no real discussion whatever of the free speech issue. It is true that Mr. Justice Holmes pointed out that our system of trials required that the conclusions of a jury or a judge should be "induced only by evidence and argument in open Court and not by any outside influence, whether of private talk or public print", and that he recognized "the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation." It is significant, however, that this Court dismissed the writ of error for want of jurisdiction on the ground that there was no substantial Federal question.

From this decision Justices Harlan and Brewer dissented. Mr. Justice Brewer confined himself to a declaration that the Federal question was substantial and should be considered on its merits. Mr. Justice Harlan went further and expressed the definite opinion that the Fourteenth Amendment guaranteed against State impairment of freedom of speech or of the press and that the action of the lower Court was in violation of these rights.

It is clear, therefore, that this Court has never considered on its merits the basic contentions involved in the case at bar. While there are statements in Mr. Justice Holmes' opinion in the *Patterson* case which tend to support the position of the California courts, it is submitted that more recent decisions of this Court require an entirely different approach to the problem here presented.

In addition to the cases already referred to, this Court's attention is called to *Craig* v. *Hecht*, 263 U. S. 255. Chief Justice Taft there stressed that punishment for contempt was proper when the publication "is intended and calculated to obstruct and embarrass the Court." The merits were, however, not discussed by the Court.

We submit, therefore, that a publication containing an expression of opinion concerning judicial conduct cannot be punished, either by way of contempt or by indictment and regardless of whether or not the case is still pending except when the publication actually obstructs or was intended improperly to obstruct the administration of justice, or perhaps, regardless of intent, under unusual circumstances where it is clear from the circumstances that there was a danger that substantial obstruction of justice would result from the publication. Guided by these principles the courts should be able to preserve their independence without interfering with the right of the citizen to criticize. The judge would be protected from direct solicitation for a particular decision in a particular case; he would not be protected from criticism of the decision. The courts and the public would also be protected in situations of peculiar delicacy from publications not directly intended to produce improper judicial action but which in those peculiar circumstances would have such result. Thus criticism of judicial action would normally be possible free from threat of punishment.

Any other rule would leave the citizen at the mercy of changing standards of judicial sensitiveness. And when the history of prosecutions for contempt for publication is reviewed, as was done by *Nelles and King*, supra, page 533, and by *Thomas, Problems of Contempt of Court* (1934), it should be plain that much proper criticism of the courts has been punished as contemptuous.* It is time that this Court laid down a rule in this field for the guidance of the judiciary throughout the country as it has already done in the field of street meetings, leaflet distribution and labor injunctions.

For this Court to approve the rule laid down by the California courts in this and the companion *Los Angeles Times* case, supra, would perpetuate the evils long ago

*We have collected some examples in an Appendix.

decried by Jefferson: In the Virginia Statute on Religious Liberty he exposed the fallacy of the doctrine that expressions could be punished because of their harmful tendency:

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill *tendency*, is a dangerous fallacy, which at once destroys all * * * liberty, because he, being, of course, judge of that tendency, will make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own." (Italics ours.)

And to approve the decision below would also disregard the decision of this Court in the *Herndon* case, supra. There this Court rejected an interpretation of a state statute aimed at punishing insurrection which would have permitted such punishment for the utterance of words merely because of their tendency to produce insurrection. Mr. Justice Roberts said:

> "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed" (p. 263).

So here, the "reasonable tendency" test will enmesh anyone who criticizes a judicial decision immediately after it is rendered if a judge can be persuaded that the critic ought to have foreseen that his words might have some effect on the judge criticized or on the public reaction to courts in general.

Surely if the state may not punish one charged with attempting to overthrow it on a showing only of reason-

able tendency to accomplish that unlawful end it should have no right to punish for the much less serious offense of contempt on a showing of like character.

The vagueness of the reasonable tendency test was recognized by Judge Gibson, dissenting in the *Times-Mirror* case, 15 Cal. 2d 99 at 124, 125:

> "• • • Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed tendency of the publication to affect and not its actual effect which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the tendency alone is considered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect.
>
> This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views.
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> In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge.
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> • • • • • •
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> In sharp contrast is the view of a few courts and nearly all of the writers that the publication should not be considered contemptuous unless it actually in-

terferes with the orderly administration of justice. Under this test no remote possibility or tendency toward obstruction is sufficient. Nor is the effect of the publication on a weak judge or a purely hypothetical judge the controlling factor. The judge is assumed to be possessed of a character commensurate with his position, and able to withstand the incidental effects of free public discussion of issues involved in a judicial proceeding."

By accepting the test laid down in the latter part of this quotation as a constitutional standard marking the permissible bounds for the punishment of out of court publications, whether by the summary method of contempt or the ordinary form of criminal trial, this Court would lay at rest the great popular discontent which has, from our earliest history, accompanied such prosecutions.

POINT III.

There was no justification for the punishment in the case at bar.

1. If the contentions previously advanced be accepted by this Court then it must follow that the publication here complained of was not properly punishable. There is no contention that there was here any actual obstruction of justice. Moreover, any claim that there was an intent on the part of petitioner to influence the action of the judge in the equity action has been eliminated. For Judge Bishop expressly found to the contrary, saying:

> "I do not think it (referring to the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision" (R. 47).

And he said that he would consider the petitioner's culpability more serious "if I did not believe that Mr. Bridges

had no intent in sending this telegram to influence the judge" (R. 48). Judge Bishop thought that it was petitioner's purpose not merely to notify the Secretary of Labor of the Union's reaction to a court decision, but also to advise employers and employees that the matter was "being energetically watched" (R. 47). Thus, if the direct intent to obstruct justice be a requisite element of a constitutionally punishable publication, such element is here lacking.

Nor were there here any special facts and circumstances which would justify the inference that there was any clear danger that obstruction of justice would result from the publication. It is true that the majority of the California Supreme Court considered that certain statements in the telegram constituted threats to tie up the ports of the Pacific Coast (R. 156). But it should be noted that the statements contained in the telegram were expressed, not with the purpose of interfering with the administration of justice, but with the hope that the agencies at the disposal of the Secretary of Labor of the United States would find a means of solving the controversy between the two competing unions in a forum other than the judicial one. This view was amplified in the answer of petitioner (R. 42) and in petitioner's testimony (R. 110 and following). Surely, such an attempt on the part of petitioner to obtain a solution of the problems involved was proper and cannot be the subject of any criticism.

It should be borne in mind, moreover, that the union of which petitioner was President, had an agreement with various waterfront employees (R. 36, 41, 113). And it was believed that the decision of the State Court in the equity action would disrupt labor relations then existing (R. 109-119). The purpose of the telegram was to point out to the Secretary of Labor the seriousness of the situation which would result if the plaintiffs in the equity action sought to take advantage of the decision there rendered, just as there might be a similar serious situation if an

employer made an agreement with a small minority of his employees in disregard of the wishes of the majority. In both cases it would be the function of the Secretary of Labor, through the various existing agencies of mediation and conciliation, to prevent the advantage obtained by the minority from being so exercised as to result in industrial conflict. There is nothing in the circumstances of this situation, therefore, to justify the inference that there was a clear danger that obstruction of justice would result from the publication of the telegram in question.

2. But regardless of all other considerations, it is submitted that the sending and publication of the telegram to the Secretary of Labor were the exercise of the right to petition the national government on a matter of national concern.

It should be noted that a similar telegram was sent to two other agencies of the federal government: to the Chairman of the National Maritime Commission and the Chairman of the National Labor Relations Board (R. 109, 110), both agencies interested in the preservation of industrial peace. And petitioner testified, without contradiction, that he had been requested by these agencies and the Labor Department to keep them informed of situations which might endanger industrial peace (R. 110, 112). His further testimony (R. 116, 117, 118) that he had no intention to influence the action of Judge Schmidt in connection with the equity action (having indeed no knowledge of the possibility of a rehearing—R. 116, 122, 123) was expressly accepted by the Judge who tried the contempt charge (R. 47, 48).

It is submitted, therefore, that the state of California had no power to restrict this exercise of the right of petition by punishing it as a contempt. That the right of petition like that of assembly, is protected by the due process clause of the Fourteenth Amendment can hardly be doubted (cf. *deJonge* v. *Oregon*, supra). And when the

petition is addressed to the national government on an issue of national concern, it is also protected by the privileges and immunities clause of the Fourteenth Amendment (cf. *Hague* v. *C. I. O.*, supra, *United States* v. *Cruikshank*, 92 U. S. 542). While this right may be subject to the police power of the state for the preservation of order it cannot be infringed, where, as here, it is established there was neither actual obstruction of public justice nor any intent to cause such obstruction.

The "high constitutional privilege" of the right of petition has often been recognized. In addition to the cases cited on page 27 of the brief originally filed herein, this Court's attention is called to *McKee* v. *Hughes*, 133 Tenn. 455, *Yancey* v. *Comm.*, 135 Ky. 207 and *In re Stolen*, 193 Wisc. 602. In the last of these cases a "petition" addressed by a group of lawyers to a court considering a disbarment proceeding was held improper (although no action was taken to punish anyone), but only because it was directly intended to influence the court in a case yet undetermined. In the other two cases petitions to public authority were held privileged in the absence of proof of malice—i. e., of a specific intent to injure the party alleged to have been defamed. By analogy, therefore, there should be no punishment for contempt in the absence of proof of a specific intent to influence the court improperly, an absence here established affirmatively.

The California Supreme Court appears to have recognized the force of the argument based on the right of petition, for it said that the punishment was not for sending the telegram, but for its publication (R. 160). That, we submit, is a narrow view of the right of petition, especially with regard to a matter of national concern, a matter involving many thousands of members of petitioner's union (see R. 109) scattered far and wide in this country and on the high seas. They were surely entitled to know what steps their president was taking on their behalf, as was also the general public which had a vital interest in averting industrial conflict on the waterfront.

While the state must have the power to protect itself against any abuse of the right of petition, even to the national government, it certainly cannot restrict that right by burdening it with punishment merely because of a supposed "reasonable tendency" that harm might result to a state agency from the publication of the petition.

Under all the circumstances, therefore, the sending and publication of the telegram in question was an exercise by petitioner of his constitutional rights of freedom of expression and to petition his government, an exercise free from any intent to obstruct state justice and, therefore, beyond the power of the state to punish.

CONCLUSION.

It is respectfully submitted that the conviction should be reversed on the ground that petitioner's rights under the United States Constitution have been infringed.

Respectfully submitted,

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APPENDIX.

(The cases are arranged chronologically.)

Sturoc's Case (47 N. H. 428—1869).

Pending a liquor prosecution a lawyer wrote a letter to a newspaper criticizing the issuance of a search warrant by which the prosecution was started and the construction of the law which permitted the prosecution to be instituted by a person residing in a town not affected. Held contemptuous as tending to bring the prosecution and its promoters into odium.

The Craig Case (266 Fed. 230, 279 Fed. 900; 274 Fed. 177, 282 Fed. 138, 263 U. S. 255—1920-1923).

Craig, then Comptroller of the City of New York, published a letter criticizing the refusal of Judge Mayer to appoint a co-receiver of the transit lines satisfactory to the City. Because he sought review by habeas corpus instead of appeal he failed in the courts, L. Hand, J., dissenting in the C. C. A.; Holmes and Brandeis, JJ., in the Supreme Court. He was pardoned by President Coolidge.

The Sanders Case (290 Fed. 428—1923).

After contempt proceedings had been instituted against one Cohen for violation of a labor injunction by a publication which called strikebreakers scabs (285 Fed. 633), one Sanders published an article declaring that the court had no right to muzzle expression of opinion on questions uppermost in the public mind. He was found guilty.

The Francis Case (11 F. 2nd 860—1926).

After a judge who had been libelled had convicted the author of the libel he published a protest against a judge sitting in judgment in such a case. Although final judg-

ment had been rendered in the criminal action the punishment was affirmed by the C. C. A. for the Third Circuit on the ground that the publication "aimed to prejudice a court in public estimation."

The Shumaker Case (200 Ind. 623—1926-1928).

The Anti-Saloon League in an official report condemned the decisions of certain Supreme Court judges of Indiana as "wet", largely because they had joined in reversing convictions under the liquor laws by far fetched findings that the convictions had rested on evidence obtained as the result of unconstitutional seizures. The State Supreme Court held this to be contemptuous in a 3-2 decision and (200 Ind. 716) ruled that the Governor had no power to pardon, the same two judges dissenting. (On that point this Court had reached a different conclusion with regard to the Presidential pardoning power: *Ex parte Grossman*, 267 U. S. 87.)

The Megill Case (114 N. J. Eq. 604—1933).

After a vice-chancellor had approved the accounts of a receiver the commissioners of Bradley Beach adopted a resolution, later given newspaper publicity, which criticized the approval because the Borough's tax claim had not been paid. This was held to be contemptuous on the theory that the error should have been reviewed on appeal, not by hue and cry in the press.

The Woodbury Case (295 Mass. 316—1936).

Members of a defense committee in a circular asking for funds, stated that defendant had been framed by a rival faction of his union. The circular was sent out before the trial; it made no reference to the court. Held contemptuous as calculated to impair the fairness of the trial. (See 50 Harv. L. R. 355 and 46 Yale L. J. 1250 doubting wisdom of decision.)

The Los Angeles Times Case (15 Cal. 2nd 99—1938-1940).

In addition to the four editorials which form the basis of the charge in the case now before this Court, proceedings for contempt were instituted based on two editorials which criticized the Bar Association committee for having brought on the first proceeding. Judge Wilson found these editorials contemptuous because they might intimidate officers of the court in the performance of their duties. (See record in No. 3 of this Term, p. 117.) The Supreme Court of California rejected this reasoning (id. p. 139). See 48 Yale L. J. 54 criticizing lower court decision.